DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON, D.C. 20370-5100

AEG
Docket No. 4336-99
12 October 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF CWO2 [redacted], USMC (RET), [redacted]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a retired Marine Corps warrant officer, applied to this Board requesting that the record be corrected by removing all documentation pertaining to the nonjudicial punishment of 26 November 1996, the removal of his name from the Fiscal Year 1996 (FY96) promotion list for Chief Warrant Officer 3 (CWO3), and any subsequent failures of selection for promotion to CWO3.

2. The Board, consisting of Messrs. Zsalman, Tew and Leeman, reviewed Petitioner's allegations of error and injustice on 4 October 2000 and, pursuant to its regulations, a majority of the Board determined that Petitioner's requests should be granted on the available evidence of record. A minority of the Board concluded that partial relief is warranted. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner began his military service by enlisting in the Marine Corps in February 1980. During the next ten years, he served in an excellent manner as evidenced by his promotion to staff sergeant (SSGT; E-6), excellent fitness reports and the award of three Good Conduct Medals and two Navy Achievement Medals. On 1 February 1990 he was appointed a warrant officer in the Marine Corps and continued to serve in an outstanding manner. In 1992 he was advanced to CWO2. In 1994 he reported for duty as

an aircraft maintenance officer to Detachment B, Marine Aircraft Group (MAG) 49, 4th Marine Aircraft Wing (4th MAW), located at Stewart Air National Guard (ANG) Base, Newburgh New York.

d. In March 1995 a "Hotline Complaint" was filed with the Department of Defense (DOD) which alleged that a Gunnery Sergeant (GYSGT; E-7) Ha, the noncommissioned officer-in-charge (NCOIC) of the airframes unit at MAG 49, had utilized government tools, material and time to fabricate metal items for various military and civilian personnel. In April 1995 the commanding officer (CO) of MAG 49 requested that the Naval Criminal Investigative Service (NCIS) investigate these matters. A number of statements were taken which implicated both Petitioner and GYSGT H in the larceny and wrongful use of government property.

e. One of the individuals who provided a sworn statement to NCIS was a SSGT R, who made a number of allegations against GYSGT H. In his statement of 13 April 1995, SSGT R said that GYSGT Ha made a deer stand for Petitioner with government material and on government time. He also said that Petitioner may have taken a small table that was government property. SSGT R also stated as follows:

> . . . I have been counseled by (Petitioner) twice. The first time was Saturday, at which time (Petitioner) was speaking to SSGT (D) and I on the hanger deck. He told us a lot of people are talking about things they don't fully understand; and he told us to not volunteer information if we are interviewed. He told us that the table that he has been accused of taking is in supply as an example of the error (sic) people are making. On Wednesday (12APR95) (Petitioner) talked to me outside the hanger. (Petitioner) came to me and told me that I was going to be interviewed by NCIS today and I should remember where my loyalties lie and again to answer honestly. He did say I should tell the truth if directly asked, but not to volunteer information.

f. On 23 May 1995 a GYSGT T provided NCIS with a sworn statement concerning his belief that GYSGT Ha and Petitioner had been involved in various illegal activities. He also stated as follows concerning Petitioner's comments to him about the NCIS investigation:

> . . . (Petitioner) has talked to me about the investigation. He has called me in to talk to him and discussed how it is a matter of loyalty when I talk to NCIS. That I should not offer anything up to NCIS or answer any leading questions when I am interviewed. I know (Petitioner) has had similar talks with SSGT (D), SSGT (R) and SSGT (S). (Petitioner) has also made comments about when he finds out who did this to him he'll give them some loyalty counseling.

Shortly after providing this statement, GYSGT T was promoted to master sergeant (MSGT; E-8)

g. On 23 May 1995 SSGT D was interviewed by an NCIS agent, who recorded the results of that interview, in part, as follows:

> SSGT (D) advised that once the investigation of (GYSGT Ha) started (Petitioner) called him aside and gave him a lecture on loyalty. SSGT (D) noted he has been in the USMC for 16 years and the only reason to give someone the lecture he was getting was when you are suspected of not doing what the person giving the lecture thinks you should. Specifically, (Petitioner) wanted to know if SSGT (D) had written a Hotline letter. Further, (Petitioner) advised, "If I find out who reported this, they will be in much more trouble than GYSGT (Ha)." SSGT (D) stated that (Petitioner) also told him "not to trust SSGT (S) because he is an NCIS plant."

For some reason, SSGT D did not reduce his comments to writing as did GYSGT T and SSGT R. SSGT D was also promoted after his interview, to GYSGT.

h. On 20 June 1995 Petitioner was advised that he was suspected of committing the offenses of theft, misuse and conspiracy to steal government property; and obstruction of justice. He then provided a sworn statement to NCIS in which he denied the various allegations of larceny and wrongful use of government time and property. He did not address, and may not have been asked about, the comments he allegedly made to SSGT R, GYSGT T and SSGT D concerning the NCIS investigation.

i. In September 1995 the FY96 CWO Selection Board met at Headquarters Marine Corps (HQMC) to select individuals for promotion to the grades of CWO3 through CWO5, and Petitioner was selected for CWO3. On 20 October 1995 the Commandant of the Marine Corps (CMC) submitted the report of the selection board to the Secretary of the Navy (SECNAV). In a memorandum of that date, CMC recommended approval of the selection board report with the exception of the recommendation for Petitioner's promotion. CMC cited the ongoing investigation and recommended that he "be withheld from nomination pending further investigation." SECNAV approved the board report and the memorandum on 9 November 1995. HQMC now states that although it is not shown in the record, Petitioner received interim notification of the foregoing action.

j. It appears from the evidence of record that the NCIS investigation was not completed until early 1996. On 23 April 1996 charges were preferred against Petitioner which alleged a conspiracy with GYSGT Ha to commit numerous offenses, dereliction of duty, violation of DOD and Navy regulations, false official statement, suffering the wrongful disposition of military property, larceny of property of the United States, conduct unbecoming an officer, wrongful removal of evidence, solicitation

of another servicemember to commit offenses and receiving stolen property, in violation of Uniform Code of Military Justice (UCMJ) Articles 81, 92, 107, 108, 121, 133 and 134. He was also charged with the following specifications of obstruction of justice, in violation of Article 134:

> In that (Petitioner) . . . did . . . sometime between 1 March 1995 through 30 April 1995, wrongfully endeavor to influence the statement of (SSGT R), a material witness in a larceny investigation by (NCIS), and in which (Petitioner) was a co-subject, by . . . stating to (SSGT R), "do not volunteer information if interviewed;" "the table I am accused of taking is in supply;" and "remember where your loyalties lie," or words to that effect . . .
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> In that (Petitioner) . . . did . . . sometime between 1 March 1995 through 31 May 1995, wrongfully endeavor to influence the statement of (GYSGT T), a material witness in a larceny investigation being conducted by (NCIS) and in which (Petitioner) was a co-subject, by stating to (GYSGT T), "It is a matter of loyalty when you talk to NCIS;" "you should not offer anything up to NCIS or answer any leading questions when you are interviewed," or words to that effect . . .
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> In that (Petitioner . . . did . . . sometime between 1 March 1995 through 30 April 1995, wrongfully attempt to influence the statement of (SSGT D), a material witness in a larceny investigation being conducted by (NCIS), and in which (Petitioner) was a co-subject by: giving (SSGT D) a lecture on loyalty; by asking (SSGT D) if he had written a hotline letter; by stating to (SSGTD), "If I find out who reported this, they will be in much more trouble than GYSGT (H)," and "do not trust SSGT (S) because he is an NCIS plant," or words to that effect . . .

k. Subsequently, the CO of Detachment B of MAG-49 appointed a Lieutenant (LT; O-3) W to conduct a pretrial investigation in accordance with UCMJ Article 32, which apparently took place on 24-28 June 1996. Petitioner was represented by civilian counsel and military counsel, LT DeV. In arriving at his findings and recommendations, LT W considered numerous items of documentary evidence, including the statements of GYSGT T and SSGT R, and the investigative action report on SSGT D. Additionally, a number of individuals testified to LT W during the five-day investigation.

l. One of the individuals who testified was SSGT R. In addition to his testimony concerning the allegations of misconduct by Petitioner and GYSGT Ha, SSGT R said that he had submitted one of the Hotline complaints which led to the NCIS investigation. Further, SSGT R testified that he had been informally reprimanded by GYSGT Ha for "jumping the chain of command." Other parts of his testimony reflect that GYSGT Ha and SSGT R had a strained relationship. Petitioner's defense counsel

then asked SSGT R a number of questions pertaining to the charges of obstruction of justice against Petitioner, and the following colloquy ensued:

Q. . . . Now, I want to direct your attention to this incident you talked about in your statement when (Petitioner) approached you and (SSGT D) . . . Where were you?

A. We were out located in the hanger deck, . . . sir.

Q. So, he talked to both of you together?

A. Yes, sir, he did.

Q. Now, he essentially told you to tell the truth; correct?

A. That is true, sir.

Q. And he told you to answer honestly the questions of the NCIS agent; correct?

A. That's true, sir.

Q. But he also told you not to give any bullshit hearsay; correct? Do you remember him using the words "bullshit hearsay?"

A. That is a true statement, sir.

Q. What do you think he meant by "bullshit hearsay" to NIS?

A. Well, (Petitioner) had mentioned the fact that not everyone knows what's going on, not everyone knows the whole story about the truth, sir.

Q. What did you think he meant by that or did you even think about it?

A. I thought he meant exactly what he said, sir.

Q. Which was?

A. Which was to tell the truth and don't sit there and blow smoke and just tell them what you know.

Q. Did you think he was telling you to conceal any information from the NIS?

A. At that time, sir . . .(Petitioner) . . . approached myself. Then he approached (SSGT D) separately, and then he approached us together.

Q. Okay. Was there any real difference between the two conversations that you were a participant in? . . . (T)he one with you alone and the one with both you and (SSGT D) there?

A. They were basically the same, sir, yes, sir.

Q. But back to my original question: Did you feel like he was telling you or asking you or suggesting to you that you conceal some information from NIS?

A. No, sir. He wasn't suggesting that we conceal information, but . . . do you mind if I go back to my (written) statement, sir?

Q. Absolutely not.

. . .

A. . . . (Petitioner) said . . . not to volunteer information, sir.

Q. Okay. What do you think he meant by that?

A. Just to answer the questions that were asked, sir.

Q. Okay. Do you think he meant for you to hold back information?

A. Do you mind if I go back to my statement?

Q. Sure . . . (L)et me rephrase. Do you remember . . . whether he said don't volunteer information or don't volunteer the rumor mill the bullshit hearsay to NIS?

. . .

A. He . . . said both, sir. He said . . . as far as the hearsay, he said answer honestly; and he also mentioned, you remember where your loyalties are at.

. . .

Q. Now, you said, "remember where your loyalties lie"?

A. Yes, sir.

Q. They are to the Marine Corps and the squadron; correct?

A. No, sir. He didn't say that, sir.

Q. What did he say?

A. He said just remember where your loyalties are at.

Q. What did you think he meant by that?

A. I think I interpreted that as loyalties towards the chain of command, sir.

Q. All right. Now, what were you supposed to do, if anything, as a result of that loyalty to the chain of command did you think that day when he said that?

A. I was supposed to just tell the truth, sir.

Q. Okay. You weren't supposed to conceal anything, hold anything back? Just tell the truth, no bullshit hearsay, correct, was the gist of the conversation?

A. Yes, sir.

Q. Did you feel you were being leaned on by (Petitioner)?

A. Well, sir, probably the only reason that I felt that way at that time, sir, is because I had knowledge of a particular table that had been manufactured.

Q. The . . .table?

A. Yes, sir.

Q. Now, did you discuss this . . .table with (Petitioner) that day in either conversation?

A. Yes, sir.

Q. Tell us what you discussed.

A. (Petitioner) had stated that the . . . table was in supply and . . . had been manufactured for supply.

Q. And anything else?

A. And that . . the rumor had it that it was being manufactured for him.

. . .

Q. Was that your conclusion?

A. Well, I concluded that . . . because of . . . what I had seen on the table, sir.

Q. That was (a) note?

A. Yes, sir.

Q. "Hold for (Petitioner)?"

A. "Do not touch."

Q. Do not touch. Now, did he tell you not to tell NIS anything about the table . . .?

A. No, sir, he did not.

m. After the foregoing questioning by defense counsel, the investigating officer questioned SSGT R, resulting in the following back-and-forth:

Q. When Petitioner said do not volunteer information, tell me at that period of time when you're in that room . . . not today, not one week later, at that time in that room . . . what did you think he meant by that statement, "don't volunteer any information"?

. . .

A. At that particular time, sir, I felt like I was being coerced into . . . not letting the investigators know certain information.

Q. Okay. Now, his tone of voice . . . you know, we all have different tones of voice; one tone when we want to be stern and we have another when we are just giving information . . . How would you describe (Petitioner's) tone of voice when he was telling you that? . . . (W)as it as a warning or you better not?

A. The first time when I was by myself, it was stern, sir. But the time that I . . . met with (Petitioner) with (SSGT D) the tone of voice was lower.

Q. . . . When he told (you) do not volunteer information, at which occasion was that . . . was it with you alone or with (SSGT D) in the room?

A. That was when I was alone with him, sir.

Q. That's when you think it was much more stern?

A. Yes, sir.

Q. In retrospect now with all the information that you have including today, what did you think that (Petitioner) meant about do not volunteer any information, knowing what you now know? . . . Still the same thing or a different opinion?

A. I still feel the same, sir.

. . .

Q. . . . I thought your testimony was that I didn't think he was trying to tell me to manipulate my testimony or hold back. Was I hearing wrong or incorrectly?

A. . . . On the first time that I spoke to (Petitioner), which was by myself, I felt that I was being almost coerced, being manipulated; and in the second time with (SSGT D) because the tone of voice was less, I didn't feel like he was coercing me.

Q. Now, . . . in the . . . meeting (with SSGT D) . . . Do you still think he was trying to influence your . . . telling you to hold back information?

. . .

A. Yes, I felt that he was trying to tell me to hold back information, sir, in an indirect way, sir.

. . .

Q. Did he at any time . . . before the interview or even after, . . . do anything that would affect your work or your performance, like take away better projects, give better projects to someone else, give you less projects, demeanial (sic) work?

A. No, sir, not at all.

Q. Did he do anything that would cause you to think that you'd been adversely affected because you were going to talk to NCIS? Did he do anything to intimidate you apart from that one conversation?

A. No, sir.

n. MSGT T testified as follows at the Article 32 investigation concerning the allegation of obstruction of justice:

Q. How many times did (Petitioner) talk to you about the investigation?

A. Once the investigation was launched, several times . . . I couldn't . . . count how many times . . . I couldn't give you a round figure, sir.

Q. All right. (D)id he ever tell you, "it's a matter of loyalty when you talk to NIS"?

A. Yes, sir.

Q. Where were you when that conversation occurred?

A. It was . . . either in his office or (another) office and he had the division chiefs in there.

Q. Did he also tell you to tell the truth?

A. I don't recall that. I recall him just saying don't answer leading questions and don't tell them anything they don't ask.

. . .

Q. Do you remember him telling you to be honest?

A. No, sir.

Q. . . . (W)ho else was at the meeting?

A. As far as I know, all the division chiefs . . . at that time . . . It should have been nine (people).

Q. . . . (I)s it your testimony that (Petitioner) in the conversation with you was trying to get you to conceal information from NIS?

A. (T)o the best of my recollection . . . what he said to me . . . was, don't answer leading questions or be careful of leading questions. Don't answer them. Be careful what you tell them. Answer only the question.

Q. So that's a no? He wasn't trying to get you to conceal information?

A. I felt that he was trying to get me to conceal information, yes, sir.

Q. You didn't feel like he was telling you not to be tricked by the NIS agent?

A. That was probably part of it also. I think . . . both (Petitioner and GYSGT H) were very worried about the investigation coming up and some of the things they would have to answer for.

o. A GYSGT Ho testified as follows at the Article 32 investigation about Petitioner's meeting with the division chiefs:

Q. Do you remember a meeting that (Petitioner) called for all the division chiefs?

A. Yes, sir.

Q. Were you at that meeting?

A. Yes, sir . . .

Q. Who else was there?

A. All the division chiefs, sir.

Q. Was (GYSGT T) there?

A. Yes, sir, he should have been . . . He is a division chief, so he should have been there.

Q. Now, what did (Petitioner) tell you in relation to the NIS investigation?

A. We were told that there was an investigation, that we would be called one at a time, some of us, . . . to give testimony; and we were told . . . not to fear anything. Just to go up and to answer any questions that were asked truthfully and honestly and whatever we were asked to answer it don't try to hide anything or don't try to, you know, think that you're protecting anybody or anything. Just to answer the questions you're asked.

Q. Did you think (Petitioner) was trying to intimidate you into concealing the information?

A. No, sir, quite the opposite. He was telling us not to fear retribution from anything and go ahead and . . . whatever questions you were asked, answer them.

Q. Did he talk anything at all about rumor mill or bullshit hearsay?

A. Yes, sir. He told us to answer the questions basically factually, I believe was the words. Do not sit there and talk off the cuff. That's one of (Petitioner's) expressions "don't talk off the cuff." What you say, you better know.

Q. Did he say you should not offer anything up to NIS?

A. No, sir . . .

Q. Did he give you all a loyalty lecture?

A. No, sir, not that I can recall.

Q. Did he use the word "loyalty" at all?

A. Not to the best of my knowledge.

Q. But you remember him saying that you should tell the truth to the NIS?

A. Yes, sir.

Q. And to answer the questions?

A. We were specifically told several times that we had nothing to fear, answer the questions you were asked honestly, and don't answer off the cuff, stuff that you don't know anything about or that you, you know, think you know. In other words, what someone has said somebody else said happened.

When asked whether Petitioner ever said not to volunteer information, GYSGT Ho testified, "I never heard that, sir." He also stated that Petitioner was his "boss," and he had a high opinion of Petitioner's truth and veracity. He also said that then SSGT D "went around a lot of people's backs," and "when he was caught and confronted, he outright denied it . . ."

p. At an Article 32 investigation, in accordance with Rule for Courts-Martial 405(h)(1)(A), if an accused chooses to respond to the allegations against him, he may either testify under oath like all other witnesses or make an unsworn statement. Petitioner chose the latter course of action. In his statement, he noted that he had been selected for promotion to CWO3. He also denied committing any of the charged misconduct. Concerning the obstruction of justice charges, he stated as follows:

Q. . . . (Y)ou . . .sought out (SSGT R)?

A. Yes, sir, I did.

Q. Did you tell him not to volunteer information at the interview?

A. No, sir, I did not.

Q. Did you tell him the table I'm accused of taking is in supply?

A. No, sir, I did not.

Q. Did you tell him to remember where your loyalties lie?

A. No, sir, I did not. I did use the word "loyalties," but I did not tell him where his loyalties lie.

Q. Would you tell the investigating officer what you said to (SSGT R)?

A. . . . I told (SSGT R) that he has no loyalties to any one individual, only to the Marine Corps and the command,

and to tell the truth and put his personal considerations of (GYSGT H) aside.

Q. Why were you concerned about that?

A. As he stated right here, he had a problem with (GYSGT H). He had a run-in less than 30 days prior to this investigation that we all knew about with (GYSGT H). The guy had a personal conflict with him. They are like two little kids.

. . .

Q. Were you concerned about hearsay?

A. Yes, sir, I was, and I mentioned that.

Q. What kind of hearsay?

A. Bullshit rumor control . . . That was a huge problem here . . . People would turn around here and say, well, he said this; and you'd look at them in the face and you'd tell them, who said it? Well, I don't know. Then get away from me. Don't pass bullshit to me. I don't have time to deal with this crap and I said that on numerous occasions with these people.

Q. Now, did you talk with (GYSGT T) alone?

A. Yes, sir, I did.

Q. Did you tell him "it's a matter of loyalty"?

A. No, sir. No, sir.

Q. You should not offer anything up to NIS or answer any leading questions when you're interviewed?

A. No, sir.

Q. What did you tell (GYSGT T) to tell the investigator?

A. (GYSGT T) was in the meeting with (GYSGT Ho). I got them in that meeting to tell them . . . I briefed them that they would probably be talked to today . . . I don't know if I used the word "loyalty" to any one person in there . . . (They) were to go up there. (They) were to tell the truth. They were not to pass any bullshit hearsay. You know, speak factual there, gents. Be Marines instead of a bunch of whiners, and . . .take your personal opinions and put them into facts, if that's what . . . is asked, but I never ever . . . told anybody to lie . . .

Q. (L)et's go to (SSGT D) . . . did you have a personal meeting with him because he wasn't at the division (heads meeting)?

A. Yes, sir, and, again, there's a Marine that had a run-in with (GYSGT Ha).

. . .

Q. . . . Did you . . . give (SSGT D) a lecture on loyalty?

A. No, sir. I gave to him the same briefing I gave to (SSGT R).

Q. Did you ask him if he had written a hot-line letter?

A. No, sir, I never did.

Q. Did you ever say "if I find out who reported this, they would be in much more trouble than (GYSGT Ha)?"

A. No, sir . . . I told (SSGT D) that I am a very big believer in the chain of command, that I did not appreciate a hot-line complaint going through the chain of command . . . that this should have been brought up within the chain of command . . .

q. In his report of investigation dated 12 August 1996, LT W found "reasonable grounds to believe" that Petitioner had committed only seven of the 22 offenses charged, including the three specifications alleging obstruction of justice. Along these lines, the investigating officer noted that reasonable grounds "represent the lowest form of legal proof in military proceedings." Concerning the specifications of obstruction of justice, LT W stated as follows:

. . . The government is required to prove beyond a reasonable doubt that (Petitioner) had the specific intent to influence the due administration of justice. I do not believe that the government will be able to meet this burden. During questions by (Petitioner's) defense counsel, SSGT (R) stated that he did not believe (Petitioner) was trying to influence his testimony. This apparent contradiction did not end here. During questioning by the investigating officer, SSGT (R) retreated and again asserted that he felt (Petitioner) was "leaning on him."

. . . The government witness on (the second) offense was (MSGT T). This witness was thoroughly impeached during the Article 32 investigation by the defense. A significant amount of evidence was presented by the defense which showed that the witness was not being entirely truthful. As a result, I did not give his testimony much weight.

> . . . I was unable to assess the credibility of SSGT (D), because the government did not call him as a witness. The government's evidence consisted of . . . a summary of SSGT (D), written by (an NCIS agent).

LT W concluded by recommending against trial by court-martial, but that the convening authority "exercise prosecutorial discretion and consider administrative options in resolving this matter."

r. In forwarding the Article 32 investigation, the CO's of both Detachment B and MAG 49 recommended administrative action. The CO of Detachment B stated that "while it can be argued that good judgment was not exercised, I am not reasonably convinced that criminal behavior did, in fact, occur. I find it difficult to discern where the truth begins or ends." The CO of MAG 49 opined that a non punitive letter of caution would be appropriate. Both CO's also recommended that the promotion warrants which had been held in abeyance now be forwarded with a suitable date of rank. However, on 12 September 1996 the general court-martial convening authority (GCMCA), Commander, Marine Forces Reserve (COMMARFORRES), disapproved these recommendations and referred all charges and specifications to a general court-martial (GCM).

s. Despite this action, on 27 October 1996 COMMARRESFOR initiated nonjudicial punishment (NJP) action against Petitioner for six of the specifications of misconduct that had been referred to GCM. Petitioner was advised that NJP action would only be based on one specification of conspiracy with GYSGT Ha to improperly use government property; two specifications of violating DOD and Navy regulations by allowing subordinates to perform personal favors for others and unlawful possession of government property; and the three specifications of obstruction of justice. On 14 November 1996, after consulting with his military counsel, LT DeV, Petitioner elected to accept NJP.

t. Subsequently, a retired MSGT D and a GYSGT A submitted statements to the effect that Petitioner and GYSGT Ho testified truthfully at the Article 32 investigation concerning the meeting with his division chiefs, and MSGT D also said that GYST T attended this meeting. Two other individuals, one of them the executive officer of MAG 49, submitted statements to the effect that GYSGT Ha and Petitioner are fine, no-nonsense Marines who had been victimized by vindictive subordinates.

u. On 13 November 1996 Petitioner submitted a letter to COMMARRESFOR, requesting that the NJP hearing be held at Stewart ANG Base or, in the alternative, that LT DeV be funded to accompany him to Headquarters, MARCORRESFOR in New Orleans, LA to act as his counsel. However, on 25 November 1996 COMMARRESFOR denied these requests.

v. On 26 November 1996 COMMARRESFOR held an NJP hearing at HQ MARRESFOR in New Orleans. In addition to Petitioner and the Commander, a government counsel and an assistant counsel were also present. During the hearing, Petitioner presented a written statement, which he offered to swear to, in which he denied the allegations of misconduct against him. Concerning the charges of obstruction of justice, he cited the conclusions of the Article 32 investigating officer, and reiterated that his conversations with the GYSGT T, SSGT R and SSGT D were due to "recent childish personality clashes they had with (GYSGT Ha) and certain unprofessional behavior," and that they needed "to be talked to reguarding (sic) how I expected them to act." Petitioner also stated that "when I see Marines acting irresponsibly by passing a lot of bullshit that later (17 months later) is found to be just that, I feel now even more so that my actions as a leader were more than justified."

w. At the outset of the NJP hearing, the Commander advised Petitioner that he did not have to make any statement during the hearing and if he did not, guilt would not be inferred. The Commander also commented on the fact that Petitioner made an unsworn statement at the Article 32 investigation and did not give sworn testimony, to which Petitioner responded that he chose this course of action on the advice of counsel.

x. The 50 page verbatim transcript of the NJP hearing reveals that the Commander spent most of his time discussing the allegations of conspiracy and violation of regulations. However, when discussing the allegation pertaining to Petitioner's conversation with SSGT R, Petitioner accused him of lying and gave the following explanation for his accusation:

> (SSGT R) came back from recruiting duty sometime in October. One of the first things he tried to do was come back in and go back in to work as a . . . technician. I told him that . . . he needed to concentrate on his new MOS (military occupational specialty), and he needed to go back and work with (GYSGT Ha), who happens to be extremely tenacious. He got in to work for (GYSGT Ha) and found out that the gong was just a little too rough (GYSGT T) came to his aid, brought him out, and put him in QA (quality assurance) . . . Now I got a happy camper. He's a real neat troop now. He sat in there and didn't do squat for two years.

Petitioner then agreed with the suggestion of the Commander that SSGT R "essentially wanted to put the heat on you for not . . . taking care of him." Petitioner also said that SSGT R "is an obviously very confused Staff NCO," and that he "was led down the path by (GYSGT T), who had a lot of animosity towards (GYSGT Ha)." Petitioner then characterized testimony of SSGT R at the Article 32 investigation as follows:

(SSGT R), in the Article 32, in his sworn testimony, identifies that I never told anybody to lie in any way, shape or form. And then later on, the . . . government counsel identified (SSGT R) as saying that I was trying to force him into making . . . or coerce him in some way. The man sat there on the stand and gave two different renditions of what I said out there. He got only half the words right. What my statement was to him, and (SSGT D), alone, out in the hanger deck, was ". . . that they had no loyalties to any one individual, only the Marine Corps and the command, and they weren't to run around running their mouths blabbing rumor control and hearsay bullshit. You pass accurate information to NIS investigators and that's the end of it." And, I said that to make them act like Marines instead of a bunch of little damned kids.

Concerning the allegation pertaining to GYSGT T, Petitioner said that the only time he talked to him was in the presence of the other division chiefs. Petitioner emphasized that "I had never talked to (GYSGT T) alone." He also denied making the alleged comments to SSGT D and said that SSGT D "got the same loyalty lecture as (SSGT R)," and he told SSGT D "you're not to pass hearsay, rumor bullshit as fact, you're not to allow yourself to run your face, you're to act professionally." Petitioner then emphasized to the Commander that GYSGT T, SSGT R and SSGT D had behaved unprofessionally with GYSGT Ha.

y. Later during the hearing, the Commander expressed interest in why Petitioner chose NJP rather than electing trial by court-martial, and he responded that $3,000 had already been spent on civilian counsel and he thought the Article 32 investigation would "vindicate me from further prosecution." The Commander also noted Petitioner's strong belief in the chain of command and asked him the relative merits of the chain of command and the truth, to which Petitioner responded, "both are equally important, sir." At one point during the hearing, Petitioner appeared to indicate to the Commander that he knew some of the practices at MAG 49 were questionable, but stated that he was also aware that these practices were sanctioned by the command and, therefore, he did not persist in questioning them. When asked by the Commander why it mattered whether the command approved, Petitioner replied "to cover my ass . . ."

z. The CO of Detachment B of MAG 49 made a statement on Petitioner's behalf by telephone, and engaged in the following colloquy with the Commander concerning the prevailing environment at the command:

Q. . . . Have you recognized that there's been a lot of, or any, attempts on the part of . . . the folks who work for you on a regular basis to do personal work, to work on cars, to do things like that?

A. From what I gather, . . . at one point in time, under a previous CO, that sort of work was endorsed by the (CO). Because . . . when Stewart (ANG Base) first stood-up they had all this machinery and equipment over there but nothing to work on. And, I think under the previous two CO's . . . that work was endorsed by the CO, but as a result of . . . this incident here, everything stopped prior to me taking command . . . My stance is, we're only going to work on government equipment.

. . .

Q. And, you also, from your perspective, recognize, from talking with your Marines, that that's a change from your predecessors?

A. Yes, sir. I think in . . . reading all of the sworn statements . . . during the Article 32, there were some Marines that said that previous CO's said it was all right for work to be done on personal gear so that the skills . . . of a welder . . . (would not atrophy) . . .

Q. Yeah, I've heard the argument, yeah . . . But, nonetheless, it took place?

A. Yes, sir, from what I gather, it did take place.

aa. Subsequently, the Commander dismissed the charges of conspiracy and violation of regulations, but found Petitioner guilty of obstruction of justice. The Commander explained his decision as follows:

Now, . . . obstruction of justice . . . I find you guilty. I have no doubt in my mind that you attempted to chill those people in your lectures; that you did that because you were concerned about where this thing was headed. I don't have any reason not to assume that: They occurred after the fact; they occurred during the process of the investigation, when you knew you were under investigation. As a result of that I have great difficulty in understanding that you would feel any need, especially if you had sought legal counsel, to speak to them about any of the proceedings. The only reason I can assume is, you were putting heat on them.

. . . It's a violation of your good judgment. You need to recognize the responsibilities you carry. You can't get your personality involved and say, "I'm bigger and you're smaller." You just can't do that.

The ones I dismissed are not supported by the evidence. I accept that there was an understanding in the command, prior to the current CO, that people could do things that are against the law: work on private gear, do stuff like

that. I accept that that took place. I also have this feeling, and you may as well understand where I'm coming from, that you didn't think that was right . . .

. . . (T)he reason I find you guilty on the obstruction of justice is, you didn't step up when this started and say, "Hey, I'm in charge, I take responsibility." You didn't do that . . . You didn't make a sworn statement. You didn't say, "Hey, wait a second, all this took place?" It didn't come out that way, that's not the way I saw it . . .

Petitioner then stated that when he committed the acts at issue, he only knew that GYSGT Ha was under investigation and did not know that he was being investigated. The commander then replied as follows:

I understand that. Nonetheless, what you've done is, you spoke to subordinates, and you spoke to them in a manner, during an investigation, that indicated that you had a vested interest in what was transpiring. And, you just can't do that . . . And . . . you can't be doing some of the things that these people accepted, regardless of whether the commander condones it or not. You have an obligation too, and it transcends any commander . . . That's why I asked your CO if it's condoned now. Under this CO, none of this would ever be before me, is what . . . you . . . are telling me. But, under the previous CO's, when it was, and the time came up, you didn't step up and say, "Hey, we really did this regularly. This is part of the stuff we do, we thought it was right, and I'm in charge of it and I'm the guy who's responsible." Then there's no reason to talk to these other turkeys. There's no reason to call them in and tell . . .anything about testifying. No reason at all. Let it float where it floats.

. . . If I could reach the other people who were involved in this. . . I'd be reaching them . . . I understand . . . the criminal activity that was involved . . . was part of an accepted norm. I do, however, believe that it is criminal, and people are guilty, when they attempt to influence investigations, or tell people what to do once an investigation is underway and they are a part of it. You have to step-up then and it's the most difficult thing to do. If I could reach back and grab those other people, I'd go after them. The fact is, they did wrong. You knew they did wrong, based on what I've read here . . . Otherwise you wouldn't have asked, as you said, if the command supported it, . . . nor would you have told me . . . that you were doing it to cover your ass. The object of the exercise is, to do what's right . . . And, then the system is supposed to back you when you do what's right. I'm supposed to back you. That's why those charges are dismissed, at the top. Because there was a false standard, and I can't hold you

accountable for that, entirely. I can hold you accountable for being independent in making advise (sic) to people beneath you. Not superiors but those who are your subordinates.

On 28 November 1996 Petitioner was issued a letter of reprimand for the three specifications of obstruction of justice.

bb. On 15 January 1997 Petitioner appealed the NJP to the Assistant CMC. He contended that since he was not advised that he was under investigation he had no reason to form any intent to impede the investigation and, therefore, could not be guilty of obstruction of justice. He further noted the comments of the Article 32 investigating officer to the effect that the evidence against him was relatively weak and contended that it did not show, even by a preponderance of the evidence, that he obstructed justice as alleged. He alleged that the government counsel erroneously instructed the Commander concerning this standard of proof. He also complained that the Commander held his failure to make a sworn statement at the Article 32 investigation against him. Concerning the allegation pertaining to GYST T, he argued that other individuals attending the meeting with the division chiefs supported his version of events. He pointed out that SSGT D never made any form of written statement supporting his allegations. He also took issue with the Commander's conclusion that he failed to take responsibility for the improprieties. In this regard, Petitioner said that, "First, from what I knew, nothing was wrong. Second, I did do something. I knew the rumor mill was acting and jumped on it . . ." Finally, Petitioner pointed out that the Commander had two of his lawyers present at the hearing, but denied his request that LT DeV be present.

cc. Also on 15 January 1997, LT DeV submitted a statement in support of Petitioner's appeal. He first alleged that Petitioner "did not have . . . any knowledge that he was suspected of wrongdoing, prior to speaking with the subjects of the obstruction of justice charges." He then protested the decision to take disciplinary action after the Article 32 investigating officer found the evidence to be weak. LT DeV then stated as follows:

(T)his case has proceeded in a way that almost amounts to bootstrapping. It's a hunt for someone, anyone, to take responsibility for conduct which has now been deemed improper, but for which it's too late to get the people actually responsible. Therefore, (GYSGT Ha) and (Petitioner) were the scapegoats. (COMMARFORRES) stated during the NJP proceedings, he would if he could reach the other people involved in this fiasco. He was right in finding my client not guilty of the charges not pertaining to obstruction of justice, but what he failed to do was realize that my client didn't know he was under investigation, did not know anyone was doing something wrong . . . and did not try to influence the investigation.

This case started as an investigation into wrongdoings that were unrelated to the obstruction of justice charges. From the evidence that was presented at the Article 32 investigation, and at the NJP, (Petitioner) did not commit those wrongdoings he was originally charged with. The (Commander) questioned my client's leadership at the NJP because he did not stand up and take responsibility for what was happening . . . While the (Commander) may now say that the conduct was wrong, that's not my client's fault, and when he spoke with those individuals who worked for him, he was not obstructing justice, but was being their OIC, as he was supposed to do.

dd. On 6 March 1997 COMMARRESFOR endorsed LT DeV's letter and recommended that Petitioner's appeal of the NJP be denied. He justified that recommendation, in part, as follows:

I found that a preponderance of the evidence established all elements of the offense of obstruction of justice. This offense does not require that an accused be the subject or co-subject of an investigation. In fact, (Petitioner) admits that he "learned of the investigation of (GYSGT H)" as early as April 1995. By his own admission, (Petitioner) had reason to believe there would be criminal proceedings against, at a minimum, (GYSGT Ha).

. . . I independently found that a preponderance of the evidence supported all charges (of obstruction of justice). The verbatim transcript of the (NJP) proceeding . . . shows that (government) counsel never advised me that the preponderance of the evidence standard had been met regarding any of the charges at issue. Instead, government counsel emphasized that the Article 32 investigating officer only found "reasonable grounds" to believe that (Petitioner) committed a particular offense.

(Petitioner) claims that the government counsel's advice regarding the burden of proof was incorrect. I found the evidence proved it was more likely than not that (Petitioner) committed the three offenses (of obstruction of justice). I dismissed three other offenses because I found that the evidence did not prove that (Petitioner) committed those particular offenses.

. . . Of particular importance to me were the statements and demeanor of (Petitioner) himself: this evidence convinced me that he did not have an innocent purpose when speaking with the three different staff NCO's but was, instead, most definitely trying to impede the due administration of justice. I did not selectively consider single statements or pieces of evidence; I considered the complete record in arriving at my ultimate decision. It was clear from (GYSGT T's) testimony at the Article 32

pretrial investigation, despite (Petitioner's) claim to the contrary, that (Petitioner) and (GYSGT T) had several conversations concerning the pending investigation. It was also quite clear that not all of these conversations were within the presence of other witnesses.

I did inquire into whether or not (Petitioner) had previously made a sworn statement. The nature of a statement, sworn or unsworn, is one factor I consider when evaluating that particular piece of evidence . . . My purpose for this inquiry was to be sure I had considered all permissible factors, including the type of statement given, prior to weighing the evidence and arriving at a decision. During the course of the (NJP) proceeding, government counsel did advise me that (Petitioner) had made a sworn statement to NCIS during the initial investigation.

(Petitioner) questions the failure to fund his counsel's travel to New Orleans in order to attend the (NJP) proceeding. Paragraph 4c(1)(b) of [part V] (to the Manual for Courts-Martial [MCM]) states that an accused's spokesperson at (NJP) is not entitled to travel and similar expenses. To fund travel for (Petitioner's) requested purpose would have violated this provision of the (MCM).

On 9 April 1997 CMC personally denied Petitioner's NJP appeal, essentially concurring with the Commander's endorsement.

ee. On 7 May 1997 COMMARESFOR submitted all of the NJP documentation to HQMC. On 9 September 1997 Petitioner was advised by HQMC that given the NJP of 26 November 1996, CMC was considering whether to recommend to SECNAV that his name be removed from the promotion list of the FY96 CWO Selection Board. Petitioner was given an opportunity to comment on this matter and did so in a letter of 6 October 1997, in which he requested "remedial promotion." In his letter, he reiterated some of his earlier contentions concerning the NJP. He also attached two letters from superior officers, both of whom questioned whether the NJP was appropriately imposed and stated that despite the investigation and ensuing disciplinary action, Petitioner had maintained a high level of performance.

ff. Notwithstanding Petitioner's letter and the input from the officers, CMC personally recommended to SECNAV that "(Petitioner's) name be removed from the FY96 (CWO) Promotion List." On 24 April 1998 SECNAV approved this recommendation and Petitioner was so advised by HQMC on 30 April 1998. Consequently, he continued to serve on active duty in the grade of CWO2 until he was released from active duty on 31 March 2000 and retired on the following day.

gg. Paragraph 96 of Part IV to the *Manual for Courts-Martial* (MCM) states that the offense of obstructing justice under UCMJ Article 134 is committed if an accused acts wrongfully in the

case of an individual against whom the accused has reason to believe there are or will be criminal proceedings pending; the accused intends to influence, impede or otherwise obstruct the due administration of justice; and the accused's conduct is prejudicial to good order and discipline or service discrediting. That paragraph goes on to give as an example of this offense, "wrongfully influencing, intimidating, impeding, or injuring a witness."

hh. Part V of the MCM sets forth procedures applicable to NJP." Paragraph 4c(1)(B) of Part V states that when an accused appears at an NJP hearing, he may be accompanied by a spokesperson, but this individual "is not entitled to travel or similar expenses. Paragraph 4c(3) states that formal rules of evidence do not apply at NJP and "any relevant matter may be considered. The *Manual of the Judge Advocate General* (JAGMAN) supplements the MCM and provides additional guidance on NJP procedures applicable to the naval service. Paragraph 0109 of the JAGMAN states that normally, a military lawyer should not form an attorney-client relationship with an accused individual whom the lawyer advises about an upcoming NJP, unless the attorney has been "detailed by proper authority to serve as defense counsel or personal representative of the accused." Paragraph 0110 states that the standard of proof at NJP is not beyond a reasonable doubt but the less rigorous standard of a preponderance of the evidence.

ii. Chapter 33A of Title 10, United States Code (10 U.S.C.) sets forth the statutory scheme for appointment, promotion, involuntary separation and retirement of active duty warrant officers. 10 U.S.C. §§ 576, 578 and 579 provide specific guidance, in part, as follows for warrant officer selection boards, the promotion of warrant officers, and removal of a name from a selection board or promotion list:

> **§ 576. Information to be furnished to selection boards; selection procedures**
>
> . . .
>
> (b) . . . (T)he selection board shall recommend for promotion to the next higher warrant officer grade those warrant officers whom it considers best qualified for promotion . . .
>
> (c) The names of warrant officers selected for promotion . . . shall be arranged in the board's report in order of seniority on the warrant officer active-duty list.
>
> . . .
>
> (e) The report of the selection board shall be submitted to the Secretary concerned. The Secretary may approve or disapprove all or part of the report.

§ 578. Promotions: how made; effective date

(a) When the report of a selection board . . . is approved by the Secretary concerned, the Secretary shall place the names of the warrant officers approved for promotion on a single promotion list for each grade . . ., in the order of the seniority of such officers on the warrant officer active-duty list.

(b) Promotion of warrant officers on the warrant officer promotion list shall be made when . . . additional warrant officers in that grade . . . are needed.

. . .

(d) Promotions shall be made in the order in which the names of warrant officers appear on the promotion list and after warrant officers previously selected for promotion in the applicable grade . . . have been promoted.

§ 579. Removal from a promotion list

(a) The name of a warrant officer recommended for promotion by a selection board convened under this chapter may be removed from the report of the selection board by the President.

(b) The Secretary concerned may remove the name of a warrant officer who is on a promotion list as a result of being recommended for promotion by a selection board . . . at any time before the promotion is effective.

10 U.S.C. § 571(b) states that appointments in the grades of CWO2 through CWO5 are made "by commission by the President."

jj. These provisions of law are similar to those in Chapter 36 of title 10, which sets forth the requirements for promotion of officers. However, 10 U.S.C. § 624(d) also provides that under certain circumstances, the promotion of an officer whose name is on a promotion list may be delayed, in six-month increments, for up to 18 months from the date the promotion would otherwise be effective. No comparable provision exists in Chapter 33A.

kk. In October 1990 the Board considered BCNR Docket #11165-90. In that case, an officer received NJP in January 1982, was selected for promotion by a selection board convened in March 1982, and was confirmed by the Senate in May 1982. He was scheduled to be promoted on 1 June 1983, but a recommendation to delay the promotion was submitted to SECNAV in May 1983.

However, the promotion was never actually delayed by SECNAV. On 6 January 1984 SECNAV removed his name from the promotion list. The Board recommended the record be corrected to show that the petitioner was promoted on 1 June 1983, noting that no delay was ever effected, and rejecting the contention of the Judge Advocate General (JAG), that the SECNAV action of 6 January 1984 ratified the earlier delay, which had been imposed without SECNAV approval. In its report, the Board noted that its decision was consistent with two other previously decided cases. The Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA) approved the Board's recommendation for relief, but substituted the following rationale:

> . . . When action is taken to remove an officer's name from the promotion list, that action must be taken in compliance with law and regulation. In this case, the power to withhold petitioner's promotion expired on 1 December 1983, when the initial period of delay ended without being extended in accordance with (§ 624[d][4]). Since petitioner's name was not removed from the promotion list until 6 January 1984, some five weeks after the period of delay had expired, such action did not comply with law or regulation and, therefore, cannot stand.

11. The Board considered BCNR Docket #6532-98 in July 1998, in which an officer was recommended for promotion in March 1995 by a selection board that was unaware that the individual had received NJP. The Board concluded that subsequent action in July 1995 by SECNAV was sufficient to delay the officer's promotion for six months from his promotion date of 1 October 1995, pursuant to § 624(d). However, since nothing was been done to extend that period of delay, as required by that provision of law, the Board rejected another advisory opinion from JAG, and concluded that this petitioner was promoted by operation of law upon the expiration of the six-month delay. Once again, ASN/M&RA approved the Board's recommendation for relief, but stated as follows concerning this favorable action:

> . . . I have . . . determined that the numerous errors and inordinate delays that occurred in the processing of Petitioner's case resulted in an injustice. Petitioner was unfairly prejudiced in his ability to exercise his due process rights under (§) 624(d)(3) as a result of these errors. Accordingly, I find that the relief proposed by the Board is appropriate.
>
> I specifically reject, however, the Board's conclusion that petitioner "was essentially promoted by operation of law upon expiration of the initial period of delay." The Constitution vests the power to appoint officers of the United States solely with the President. (citation omitted) Therefore, a military officer can be appointed only by the President or one acting under delegated authority from the President.

mm. In the case of *Rolader v. United States*, 42 Fed.Cl. 789 (1999), the United States Court of Federal Claims set aside the removal of an Air Force officer's name from a promotion list because of non-compliance with the applicable regulation. The court also took note of another provision in that regulation to the effect that a delay initiated under § 624(d) automatically delays the promotion until a decision is made on the removal action, even if that delay extends beyond the eighteen-month time limit set forth in that statute. In dicta, the court was skeptical as to whether this regulatory provision complied with the law. *Id.*, at 786, 787. The court also said that since the officer was not properly removed from the promotion list in a timely manner, "he was promoted by operation of law." *Id.*, at 787.

nn. Petitioner applied to the Board in July 1999, after the adverse actions at issue but before his retirement from the Marine Corps. In an attachment to the application, Petitioner's counsel contends that the NJP should be removed from the record because of procedural and substantive deficiencies. Specifically, counsel contends that COMMARRESFOR erred to Petitioner's prejudice in referring all of the charges and specifications to trial after the conclusion of the IO to the effect that the evidence did not warrant such action. Counsel argues that by referring charges to trial that he knew, or should have known, could not be proven beyond a reasonable doubt, COMMARRESFOR intended "to intimidate (Petitioner) into acceptance of NJP," thus "making the stakes of a trial unbearably high . . . " Counsel further contends that it was improper for COMMARRESFOR to deny Petitioner's request that LT DeV be funded to accompany him to New Orleans for the NJP, given that the Commander had two military lawyers with him during the hearing, and one of them remained during the Commander's deliberation. Turning to the substance of the allegations against his client, counsel essentially echoes Petitioner's earlier contention that the evidence did not show, even by a preponderance of the evidence, that he obstructed justice as alleged. In a related assertion, counsel alleges it was improper for the Commander to hold it against Petitioner that he made an unsworn statement at the Article 32 investigation instead of testifying under oath.

oo. Counsel also maintains that it was improper to remove Petitioner from the FY96 CWO3 promotion list because, in accordance with § 579(b), such action must be taken before the promotion becomes effective. Counsel alleges that Petitioner's promotion became effective long before the 1998 action removing him from that list.

pp. HQMC has provided advisory opinions on counsel's contentions of error. On 20 January 2000, the Military law Branch of the Judge Advocate Division (JAM3) opined that the NJP was procedurally and substantively correct. Concerning the substance of the offenses charged, the advisory opinion states

only that the Commander's imposition of NJP "is supported by the evidence," and did not constitute an abuse of discretion. JAM3 goes on to note that as GCMCA, COMMARRESFOR, was not bound by the report of the Article 32 IO, and acted within his authority when he elected to refer the charges to trial despite the IO's recommendation. Noting that the referred charges were dismissed during the NJP process, JAM3 opines that Petitioner "sought and received the benefits of disposition of his case in a nonjudicial forum, the very result suggested by the IO." JAM3 further concludes that COMMARRESFOR acted properly in refusing to fund LT DeV's travel to New Orleans for the NJP hearing, despite the fact that he had acted as Petitioner's counsel during the Article 32 hearing, since that decision was within the discretion of the Commander. The advisory opinion goes on to conclude that Petitioner's name was properly removed from the FY96 CWO3 promotion list, stating as follows concerning the contention that the action was ineffective because it was untimely:

> The power to appoint officers is vested in the President by the U.S. Constitution and cannot become effective "as a matter of law." To do otherwise would create an impermissible legislative appointment in violation of the Constitution. Once all administrative action was completed, Petitioner was informed that CMC was considering removing his name from the promotion list. Petitioner was then given the opportunity to comment, and did so . . . (He) was afforded the due process required by law, and his argument to the contrary has no merit.

In an advisory opinion of 25 February 2000, the Promotion Branch of HQMC (MMPR) adopted JAM3's conclusion on the promotion issue. Additionally, at the request of a staff member of the Board, MMPR informally advised that if Petitioner had been advanced in due course, absent the adverse action, he would have had a promotion date and date of rank of 1 December 1995.

qq. Further guidance on the promotion issue was received from the Deputy Assistant Judge Advocate General for Administrative Law (JAG-13) in an advisory opinion of 4 August 2000, which states that the removal action was legally unobjectionable. JAG-13 initially points out that on 9 November 1995, when SECNAV approved CMC's memorandum of 20 October 1995 recommending that Petitioner's nomination be withheld, Petitioner's appointment to CWO3 was "effectively delayed." JAG-13 believes that unlike the statutes dealing with the promotion of officers, there are no provisions of law specifically authorizing such a delay for warrant officers. However, JAG-13 concludes as follows that the delay was proper:

> . . . (B)ecause the Constitution vests appointment power in the President, the decision whether to make an appointment or delay a decision on an appointment is within the inherent authority of the President. In other words, the power of appointment is a political power, "to be exercised

by the President according to his own discretion." [*Marbury v. Madison*, 5 U.S. 137, 167 (1803).]

JAG-13 then notes the statutory authority set forth in § 579(b) for SECNAV to remove a warrant officer's name from the promotion list prior to the effective date of the promotion. JAG then opines as follows concerning the effective date of Petitioner's promotion:

> . . . Each promotion is a new appointment, governed by the Appointments Clause (of the Constitution). In *Marbury v. Madison*, the Court provided conclusive guidance on when an appointment is an effective and final act. The Court states that an appointment has been "made when the last act to be done by the President was performed." A commission is conclusive evidence of an appointment and the signing of a commission is the "last act." Thus, a promotion is not effective until the appointment has been made and an appointment is not made until the President has performed the last act.
>
> In Petitioner's case, there is no evidence that his appointment to CWO3 was made and the resulting commission issued. Petitioner's scheduled date for promotion represents only planned action to promote him at a certain time based on his position on the promotion list and the need for officers in the higher grade. Because he was not appointed to CWO3, the planned promotion did not occur. Accordingly, because the promotion was not effective, the removal of his name from the promotion list was proper.

JAG-13 then concludes § 578 did not mandate Petitioner's promotion on a date certain, stating, in part:

> . . . § 578(a) states that upon approval of the report of a selection board, the Secretary concerned "shall place the names of the warrant officers approved for promotion on a single promotion list . . . " (§ 578[d] states) that "[p]romotions shall be made in the order in which the names of warrant officers appear on the list." Petitioner argues that this language compels his appointment because warrant officers who were junior to him on the promotion list were promoted. Such an interpretation of the statutory language is without support. The subsection relates to normal order or sequence of promotion and does not compel the appointment of a particular officer. Such compulsion is not contained in the statutory language. Also, as discussed above, an appointment may not be compelled by statute or occur by operation of law.

Accordingly, JAG-13's position is that the removal action under § 579 was proper because "Petitioner was never appointed to CWO3, and because an appointment may not be inferred or compelled by law, Petitioner's promotion was never effective."

rr. All of the advisory opinions in Petitioner's case were forwarded to counsel for review and possible rebuttal. By letter of 1 September 2000, counsel responded, in part, as follows, to the assertions of JAM3, MMPR and JAG-13 that Petitioner's name was properly removed from the FY96 CWO3 promotion list:

> . . . (I)f (SECNAV) intended to act to remove (Petitioner) from the Promotion List, he necessarily was required to do so prior to 1 December 1995 before (he), by law, was required to be promoted based on the order his name appeared . . . on the Promotion List. By failing to act prior to 1 December 1995, (SECNAV) could take the action he ultimately took only if he were to violate the provisions of (§) 578(d) or if he imposed a "delay" of (Petitioner's promotion where no such delay of promotion was authorized. Where (SECNAV) fails to comply with law or regulation--as here--(SECNAV) acts arbitrarily and capriciously and his action cannot stand. (citation omitted) . . .
>
> . . .
>
> The Advisory Opinion provided by (JAG-13) . . . essentially provides that (SECNAV) is not required to comply with . . . § 578(d) or that (SECNAV) may comply with that law only as a matter of discretion. Such a reading of the statutory scheme is simply not available. The law requires that officers be promoted in the order their names appear on the Promotion List. If (SECNAV) decides there is reason for removal of a warrant officer's name from the Promotion List, there is no provision for *delay* of that promotion. Accordingly, (SECNAV) must act to remove the officer from a Promotion List, if at all, before the law--§ 578(d)--compels that the warrant officer be promoted . . .

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, a majority of the Board, consisting of Messrs. Tew and Leeman, concludes that Petitioner's request warrants favorable action. Concerning the NJP, the majority believes it should be removed from the record not because of procedural errors, but because the evidence fails to show that Petitioner obstructed justice as alleged. Since the NJP caused Petitioner's removal from the promotion list, the majority believes this action must be set aside. The majority additionally believes that even if the NJP is deemed proper, the removal action was fatally flawed because such action was not taken before 1 December 1995, the date Petitioner's promotion to CWO3 became effective.

In concluding that there is no merit to counsel's contentions on the procedural aspects of the NJP, the majority essentially concurs with JAM3's analysis of these issues. However, even

though the majority agrees with JAM3 that COMMARRESFOR had no legal obligation to do so, the majority believes the better decision would have been to fund LT DeV's travel to Petitioner's NJP hearing. Clearly, an attorney-client relationship had been formed between these two individuals. Further, at the NJP hearing, the Commander had not one but two lawyers available to provide him with necessary advice. Given these facts, depriving Petitioner of LT DeV's advice and assistance at the NJP proceedings gave the appearance of unfairness. However, the majority does not base its recommendation for relief on this issue because it appears from the NJP proceedings that Petitioner made the most persuasive case possible for himself and, accordingly, LT DeV's presence would not have altered the outcome.

Turning to the substance of the NJP, the majority initially notes that obstruction of justice is a "specific intent" crime--no offense is committed unless the accused acts with the intent to "influence, impede or otherwise obstruct" the administration of justice. Accordingly, it must be shown that when Petitioner spoke with SSGTs D and R and GYSGT T, he did so with the intent to derail the ongoing investigation into the conduct of GYSGT Ha and himself. The majority does not believe the evidence shows that he had any such intent.

Concerning Petitioner's comments to SSGT R, the majority is aware that these individuals differ in some respects as to just what Petitioner said. However, when questioned by Petitioner's counsel, SSGT R stated under oath that Petitioner told him to tell the truth, answer questions honestly, refrain from "bullshit hearsay," and to answer only the questions that were asked. Assuming for the moment that SSGT R accurately recalled Petitioner's statements, the majority believes that this advice from Petitioner to SSGT R was not only unobjectionable, it was exemplary guidance for anyone about to be questioned during an investigation. The majority also notes SSGT R's testimony to the effect that Petitioner told him to "remember where your loyalties lie," or words to that effect. However, when questioned about this statement, SSGT R said he interpreted it as a reiteration of Petitioner's direction to be truthful. Most important, SSGT R stated that he did not believe Petitioner was suggesting that he conceal information.

The majority realizes that when questioned by the IO, SSGT R gave a different interpretation of Petitioner's comments. However, this "flip-flop" leads the majority to believe that his credibility is suspect. Additionally, according to Petitioner's statement at the NJP hearing, SSGT R was unhappy with him because he sent SSGT R to work with GYSGT Ha, thus giving him motivation to put his conversations with Petitioner in their worst possible light. Even the Commander apparently conceded that SSGT R "wanted to put the heat on (Petitioner)." Accordingly, the majority puts little credibility in SSGT R's change of heart.

Although Petitioner also took issue, to some extent, with GYSGT T's version of events, he consistently opined that Petitioner tried to get him to conceal information. However, the majority notes that according to GYSGT T, Petitioner essentially told him the same things he told SSGT R. Additionally, one of the occasions on which GYSGT T felt himself coerced by Petitioner was the meeting with the division chiefs. However, GYSGT Ho, apparently an individual with no axe to grind, testified that Petitioner's remarks at that meeting were not intimidating but "quite the opposite." The majority also cannot help but note the opinion of the IO to the effect that GYSGT T was not a credible witness.

Concerning Petitioner's statements to SSGT D, the majority notes that SSGT D did not, at any stage of the NCIS or Article 32 investigations, submit a signed statement or testify under oath. The only evidence pertaining to these statements was the 23 May 1995 report of interview. Although the majority realizes that the rules of evidence at NJP are very relaxed, and the Commander could consider the report of interview, the majority also believes that such a report is far less credible than testimony, a sworn statement, or a signed statement. Accordingly, the majority is inclined to give it very little weight, especially given Petitioner's contention, at the Article 32 investigation and the NJP hearing, that the report of interview does not accurately reflect what he said to SSGT D.

The majority also believes the Commander improperly held it against Petitioner that at the Article 32 investigation, he elected to make an unsworn statement in lieu of sworn testimony. RCM 405 states that an accused may take one of three courses of action at an Article 32 investigation--say nothing, make an unsworn statement, or testify under oath. That right is rendered essentially meaningless if, at a subsequent proceeding, the decision-maker can use this legal and proper election against the one who asserts it. This is especially true in Petitioner's case since, during the NCIS investigation, he was willing to and did make a sworn statement, although it did not touch on the allegations of obstruction of justice. Additionally, at the NJP proceedings, he offered to swear to an exculpatory statement. Given the very shaky nature of the evidence against Petitioner, the Board believes the action of the Commander might have been different if he had given Petitioner's statement at the Article 32 investigation more weight.

Accordingly, the majority does not believe that the statements and testimony of the three staff NCO's are sufficient to show that Petitioner obstructed justice, a point of view which the Article 32 IO apparently shared. The majority is aware that the IO's comments were made in connection with his recommendation that the charges against Petitioner not be referred to trial by court-martial, at which those allegations would have to be proven beyond a reasonable doubt. The majority is aware that charges at NJP are subject only to the standard of a preponderance of the

evidence, but believes that the evidence against Petitioner fails to meet even this lesser standard of proof. Therefore, the NJP should be removed from Petitioner's record. Since Petitioner's name was removed from the FY96 CWO3 promotion list because of the NJP, the majority believes this adverse action also must fall.

The majority also concludes that even if the NJP is deemed valid and remains in the record, Petitioner's name was removed from the promotion in violation of the applicable laws and, accordingly, the removal action must be set aside. In reaching this conclusion, the majority carefully analyzed the relevant sections of Chapter 33 of title 10 as they pertain to Petitioner's case.

In accordance with § 576(b), the CY96 CWO selection board deemed Petitioner one of the best qualified for promotion to CWO3 and recommended him for promotion. Accordingly, his name was placed on the selection board's report, as required by § 576(c). The report was then presented to SECNAV who, on 9 November 1995, approved the selection board's report *in toto*. It is clear that SENCNAV did not remove Petition's name from the selection board report because § 579(a) states that such authority is reserved to the President. Additionally, the subsequent adverse action against Petitioner clearly reflects that he was removed from the promotion list and not the board report.

Upon approval of the board report, § 578(a) required that all of the names from that report be placed on the CWO3 promotion list in order of seniority. § 578(d) required that the individuals on the promotion list be promoted in that order. Most important, § 578(b) states that promotions "*shall* be made when . . . additional warrant officers are needed." (emphasis supplied) It appears clear that in Petitioner's case, additional warrant officers were needed on 1 December 1995, the date HQMC has stated that Petitioner would have been advanced absent the adverse action. In accordance with § 579(a), SECNAV was empowered to remove Petitioner's name from the promotion list, and thus prevent his advancement to CWO3. However, that provision of law required that such action be taken "before the promotion is effective." In Petitioner's case, promotion was effective on 1 December 1995. Since final action to remove Petitioner's name from the promotion list was not taken until 24 April 1998, more than two years later, the majority concludes that this action was without force and effect.

The majority notes that the foregoing conclusion is essentially consistent with the decisions in past BCNR cases. The only difference in those cases was that the deadline for final removal action was pushed back by periods of delay imposed in accordance with § 624. In both of those cases, however, the Board concluded that after the initial period of delay expired without renewal action, the petitioner was entitled to promotion. In Petitioner's case, since no period of delay was authorized in Chapter 33A, the deadline of 1 December 1995 could not be changed. Accordingly, the majority adheres to the conclusion of

the Board in prior cases to the effect that an individual is promoted by operation of law if his or her name is not removed from the promotion list in accordance with the time limits set forth in the relevant statutory scheme. In this regard, the majority cannot help but note that since the Board last considered this issue, its position has been judicially vindicated in *Rolader, supra*. In reaching this conclusion, the Board rejects the input of JAM3 and JAG-13 and concludes that §§ 578(b) and (d) and 579(b), when read together, required that Petitioner be promoted to the grade of CWO3 on 1 December 1995. Along these lines, JAG-13 apparently believes that the Constitution authorizes an indefinite delay prior to "the last act" of appointment. However, essentially the same conclusion was subject to criticism in *Rolader*.

In view of the foregoing, the majority finds the existence of an error warranting the following corrective action.

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing all references to the NJP of 26 November 1996.

b. That the record further be corrected to show that Petitioner was not removed from the FY96 CWO3 promotion list on 24 April 1998, but was promoted to CWO3 on 1 December 1995 and served on active duty continuously in that grade from the latter date until he was released from active duty on 31 March 2000 and transferred to the Retired List in that grade on 1 April 2000.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

MINORITY CONCLUSION:

Mr. Zsalman, the minority member, does not believe the NJP should be removed from the record and, accordingly, is unable to fully concur with the majority's disposition of Petitioner's case.

Mr. Zsalman agrees with the majority that there is no merit to counsel's contentions concerning the procedural aspects of the NJP. However, he disagrees that the NJP should be removed on substantive grounds. The minority member believes it is important to bear in mind that the standard of proof at NJP is not beyond a reasonable doubt, but only a preponderance of the

evidence. Further, it is the up to the NJP authority, in this case COMMARRESFOR, to weigh the credibility of witnesses and decide who is worthy of belief. In doing so, the NJP authority is not bound by formal rules of evidence and may consider all relevant evidence.

Taking all of this into consideration, the minority initially notes that at the time of Petitioner spoke with SSGTs R and D and GYSGT T, he clearly was aware that an investigation was ongoing, and that his friend, GYSGT Ha, was a subject of that inquiry. The minority also believes that Petitioner knew that the investigation had already focused, or might focus, on allegations of his improper activities. Along these lines, the minority notes the Commander's conclusion at the NJP hearing to the effect that illegal activity took place at Petitioner's command and he knew about it. Accordingly, the minority member believes he had a motive to derail the investigation or redirect it away from himself.

It is in this light that Mr. Zsalman examines the testimony and statements of the three staff NCO's on which the Commander relied in imposing NJP. SSGT R's testimony in response to the questions of Petitioner's defense counsel was, in many ways, favorable to Petitioner. When questioned by the IO, however, SSGT R's testimony was less favorable to him. However, Mr. Zsalman believes that the commander could well conclude that SSGT R's responses to the IO did not, in the main, contradict his earlier testimony, but clarified and expanded upon it. Although SSGT D did not submit a sworn statement or testify at the Article 32 investigation, the Commander could still rely on it and find it credible. Concerning the testimony of GYSGT T, the minority notes that the IO found some credibility problems with this witness; however, the Commander was not bound by the IO's conclusion. Further, Petitioner essentially said at the NJP hearing that he did not speak to GYSGT T about the investigation except at the meeting with the division heads, however, at the Article 32 investigation, he admitted that he had talked to GYSGT T alone. Accordingly, if GYSGT T had credibility problems, so did Petitioner.

The minority member is aware that in his report following the Article 32 investigation, the IO essentially concluded that the government could not prove that Petitioner committed the offenses at issue beyond a reasonable doubt, and recommended against trial by court-martial. However, the IO also concluded that there were reasonable grounds to conclude that Petitioner had committed the offenses and recommended consideration of "administrative options" in resolving the case. That is exactly what happened--NJP action was initiated and the Commander found that Petitioner had committed the offenses as alleged.

Accordingly, the minority member believes that the Commander could properly conclude that Petitioner possessed the requisite intent to improperly influence the NCIS investigation. Mr.

Zsalman also concludes that the Commander could properly consider, in arriving at this conclusion, the fact that Petitioner declined to testify under oath at the Article 32 investigation and instead submitted an unsworn statement. Certainly, testimony given under the penalty of perjury is more worthy of belief than unsworn testimony. Given the very liberal rules of evidence in effect at an NJP hearing, it was legally unobjectionable for the Commander to consider this factor in arriving at his decision.

Accordingly, Mr. Zsalman concludes that the NJP was properly imposed and should remain in the record. However, Mr. Zsalman concurs with the majority's conclusion that removal of Petitioner's name from the CWO3 promotion list was not accomplished in accordance with the law and, therefore, must be set aside.

MINORITY RECOMMENDATION:

a. That Petitioner's record be corrected to show that he was not removed from the FY96 CWO3 promotion list on 24 April 1998, but was promoted to CWO3 on 1 December 1995 and served on active duty continuously in that grade from the latter date until he was released from active duty on 31 March 2000 and transferred to the Retired List in that grade on 1 April 2000.

b. That no further relief be granted.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

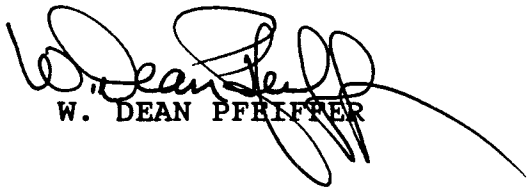
d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.



W. DEAN PFEIFFER

MAJORITY RECOMMENDATION APPROVED:

MINORITY RECOMMENDATION APPROVED: